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Modeling Class Counsel

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I. INTRODUCTION

The class suit has become an established and increasingly prominent institution of our procedural system. Our system of law enforcement through private litigation, including class suits and other aggregative civil procedures, is virtually unique throughout the world and is an integral element of the American governance system. The class suit is a powerful litigation mechanism and therefore has become one of our "institutions."[1]

A key institution in class suit procedure is the role of plaintiff's counsel. There has been an abundance of judicial consideration of that role and nearly as much attention in law review literature. Nevertheless, a clear concept of the role of class counsel, and counsel's relationship to the class, has been difficult to formulate.

So far as client-lawyer relationships are concerned, some class suits are not much different from nonclass proceedings. This is true of litigation on behalf of an unincorporated association or other group that has organizational form apart from the legal matter at issue. An example of this type is a suit framed as a class suit in response to

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1. *See, e.g.*, Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493 (2001).

limitations on the capacity of the client. For example, a suit by a labor union may have to be brought as a class suit because the governing procedural rules do not permit an unincorporated association to maintain certain types of claims.[2] Another such type of class suit is that sponsored (and financed) by a social action group, such as the American Civil Liberties Union or, in recent years, the Washington Legal Foundation. Here, the sponsoring organization is the authoritative voice in dealings with class counsel, subject to due regard for the interests of the individual class members.

In contrast is the class suit for damages organized by class counsel and conducted on a contingent fee basis. Some thoughtful analysts have drawn a general distinction among these characteristics of class suit litigation: One type is said to be "social action" (by the sponsoring group), the other type is "entrepreneurial" (by the initiating lawyer). No doubt this distinction is no more distinct than many others that the law undertakes to make. However, it is unnecessary to refine this distinction to make the point that the chief procedural and ethical difficulties have arisen in class suits where the primary claim is for damages on behalf of a dispersed group of claimants.

II. CLASS COUNSEL IN A DAMAGES CLASS SUIT

It is recognized that, in the entrepreneurial class suit, the role of plaintiff's counsel is the key.[3] It is typically the class counsel who conceives of a class claim, defines the substantive basis for the claim, selects the target of the suit, and lays the venue where the litigation is to be prosecuted. Class counsel must prevail in the critical pre-certification stage of a suit seeking class status, perhaps also in certification itself. (I say "perhaps" only because class suits may be settled, and often are settled, before certification). Class counsel is instrumental in settlement negotiations, most class suits being settled at the point of certification or shortly thereafter, if indeed settlement has not been previously agreed upon. Often the certification and settlement stages are compressed into each other, in which event the role of class counsel is even more salient.

However, the proper role of class counsel remains a matter of great uncertainty and controversy. The American Law Institute's *Restatement (Third) of Law Governing Lawyers*, published just a few years

2. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982).

3. *See, e.g.*, Lazy Oil Co. v. Witcorp., 166 F.3d 581 (3d Cir. 1999). *See generally* John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Actions and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

ago, noted a variety of special problems concerning the authority and responsibility of class counsel. But, having identified these peculiarities, the *Restatement* in virtually all instances undertook no definitive resolutions, and for good reason. Neither the rules of procedure, nor the profession's ethical codes, nor the judicial decisions had developed a clear definition of the role.

Meanwhile, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has given extended consideration to the problems of class suits, including the role of class counsel. But these deliberations also have not come to illuminating conclusions. Class suits, and the lawyers who specialize in them, continue to be lauded as necessary instruments of justice and condemned as purveyors of blackmail.

About the best that analysts have been able to do is identify class counsel as a "private attorney general."[4] For reasons that others have suggested and which I shall explicate, this term is unhelpful at best, and on balance adds to the confusion. We therefore need to begin again, and this exposition is an effort in that direction.

The conclusion suggested here is paradoxical, perhaps bizarre. I will suggest that the best analogy to representation of a class is representation of an incompetent. This approach has been implied in suggestions from various sources. It is explicit in suggestions that, when there is no sponsoring organization for the class party, there should be a guardian for the class.[5] It is implicit in the Private Securities Litigation Reform Act adopted a few years ago by Congress. This Paper endeavors to extend the analysis of that idea.

III. THE ORDINARY CLIENT-LAWYER RELATIONSHIP

A first step in the analysis is to bring to mind the characteristics of the normal client-lawyer relationship as a basis for contrast. In this step, the analysis is perhaps complementary to a thoughtful earlier study done by my colleague Professor David L. Shapiro.[6]

The ordinary client relationship is more or less explicit in the law governing lawyers, as set forth in the *Restatement (Third) of the Law*

4. *See generally* Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988); Pamela Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183. Professor Karlan uses the term "private attorney general" to include a concept usually referred to as a private right of action created by a federal regulatory statute. The denomination "private attorney general" apparently originated with Judge Jerome Frank in a 1943 decision. *See* Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

5. *See* Macey & Miller, *supra* note 3.

6. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

Governing Lawyers, and as regulated in the ethical codes, particularly the American Bar Association's *Model Rules of Professional Conduct*. I will use the *Model Rules* as my primary framework.

The basic rules of the ordinary client-lawyer relationship are found in Model Rules 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.6 (Confidentiality) and 1.7 (Conflict of Interest). These rules presuppose that a client is in existence prior to the formation of a client-lawyer relationship.[7] Indeed, the *Model Rules* now address the category of "prospective client." The rules further presuppose that the person who becomes a client had previously undertaken a deliberative process that resulted in a decision to seek legal counsel.[8] Of course, for a person who is sued—a defendant—the decision whether to engage a lawyer has been preempted by the plaintiff's choice, except when the defendant decides to default or to defend pro se. However, the basic point is that a client is a person who previously was a prospective client, who concluded that he had a problem requiring a lawyer, and who mobilized himself to "cross the river," so to speak, to transform a conflict into a legal dispute.

Upon a prospective client's initiative to become a client, the rules contemplate a discussion with a lawyer about whether engaging legal counsel is indeed appropriate, about the scope of the representation (Rule 1.2), and about the lawyer's compensation (Rule 1.5). The comment to Rule 1.1 refers to the "matter" that a lawyer is engaged to handle. The term "matter" is used in the *Model Rules*, and in common professional parlance, to indicate the task or engagement involved.

The legal concepts of the ordinary client-lawyer relationship in the older ABA *Model Code of Professional Responsibility* are somewhat different, but their import is the same. So also is the common law essentially the same. At early common law, an accused in a criminal case could not have a lawyer, and the use of lawyers in civil cases was optional. The developed common law visualizes the usual relationship between client and lawyer as being contractual.[9] A contractual relationship is to be contrasted with, for example, a status relationship, such that a litigant could not appear pro se and therefore would be obliged to participate through counsel. A contractual relationship presupposes a legally competent actor in the position of the client. The legally competent client then negotiates with the lawyer to define the project (the "matter") and the fee to be paid.

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7. The ethics codes did not recognize the category of "prospective client." The RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 15 (2000) does so, as does the recently revised ABA MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002).

8. *See* Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425 (2000).

9. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 18 (2000).

It is perhaps worthwhile to bring to mind the legal background in which this institution arose. Historically, engagement of a lawyer under the common law by a client was optional: the client had the right to employ counsel, but without any formal disability or incapacity for omitting to do so. This approach remains the norm in our culture.[10] In modern criminal procedure, however, a person accused of a serious crime is, in effect, generally required to have counsel, as much to assure that a conviction will be protected against later reversal as to assure fairness of prosecution in the first instance. So too, in various regulated transactions, as in the issuance of securities in the public markets, a legal opinion is virtually obligatory. But these are exceptional situations. The baseline proposition is that a client may have a lawyer or do without.

From these premises it follows that the client in the ordinary client-lawyer relationship is the principal and the lawyer the agent, with a corresponding allocation of authority.[11] Accordingly, Rule 1.2 ordains that "the lawyer shall abide by a client's decisions concerning the scope of the representation." Rule 1.2 and 1.4 together require consultation between client and lawyer about "the means by which [the objectives] are to be pursued" and require that the lawyer "keep the client reasonably informed about the status of the matter."

Supporting these specifications are the rules governing confidentiality (Rule 1.6) and loyalty (Rule 1.7). The rules concerning confidentiality and loyalty are formulated in terms of a specific client: It is information relating to a specific client that must be kept confidential, and it is that client to whom the lawyer's duty of loyalty runs. So also, it is that client who, after termination of the engagement, is owed the lawyer's duties to refrain from misuse of client confidences and to refrain from undertaking adverse representation in the same or a substantially related matter (Rules 1.8 (b) and 1.9).

By the terms of Rule 1.10, which expresses the concept of imputation, most all of the foregoing obligations are imposed on other members of a lawyer's firm.[12]

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10. It is noteworthy that in some civil law systems, litigants in various circumstances are required to have lawyers. *See, e.g.*, B.S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORT (1986). In the old communist systems, defendants accused of major crimes were required to have a lawyer and the lawyer was expected to share in the court's burden of tutelage for the accused. *See* Inga Markovits, *Children of a Lesser God: GDR Lawyers in Post-Socialist Germany*, 94 MICH. L. REV. 2270 (1996).

11. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS ch. 2, introductory note (2000).

12. For application of the imputation rule against class counsel, see, for example, *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 2001 WL 64775 (D. Me. Jan. 26, 2001).

IV. CONTRAST: CLASS COUNSEL

None of the rules governing the ordinary client-lawyer relationship works very well when applied to class counsel. The difficulties begin with differences in what one might call the originating event. In an ordinary client-lawyer relationship, the originating event is a real world occurrence that has happened to the client or is imminent, and which impels the client to seek out legal assistance.[13] It could be the misfortune of an injury or the good fortune of a business or other contractual opportunity. In contrast, the originating event in a class suit is more likely to stem from lawyer reconnaissance, in which the lawyer discerns a legal wrong committed against a number of people. Of course, in the class situation there are real people to whom something has happened, and some real people may have approached a lawyer about it. But transforming such a grievance into a class suit requires legal imagination, whereby the lawyer describes the occurrence in verbal and categorical terms and extrapolates to the conclusion that a group response is appropriate. The critical difference is between a happening as perceived by a layperson and a categorization as formulated by a lawyer.

Thus, in the typical class suit situation, there is neither "a" client, nor "a" matter, nor a corresponding basis for discussing the scope of representation or fee. The identity of the client and the definition of the matter are constructs fashioned by the lawyer. Moreover, until a representative for the class is designated, there is no one empowered to enforce the obligation of professional diligence and, at least at the outset, no one to communicate with the lawyer on behalf of the clients. The obligation of confidentiality can be merely formal. The clientele often has no occasion to impart confidential information to the lawyer. In many situations, the communications among lawyer and client will be more or less public. At the same time, the "information relating to the representation," so far as the legal wrong is concerned, will be generated by the lawyer through investigation and perhaps by discovery from the party named as defendant.

The obligation of loyalty on the part of class counsel is clear in principle but often is indeterminate in focus. Any relationship with more than one client involves the possibility of conflict among the interests of the clients, and therefore the risk that the lawyer will have corresponding conflicting loyalties. As a prospective class suit proceeds in formalization, there can be problems in defining the class—what type of wrong, in what period, etc. The definition of the class may be the target of objection, leading to potential amendment of class definition: What if some of the class as originally defined is then left

13. *See* Sarat, *supra* note 8.

out? What if a similar exclusion is eventually made in a verdict or other fact-finding at trial?

Settlement is a notoriously tricky problem for class counsel. There is an immediate problem of conflict between the interests of the class, however defined, and the interests of counsel.[14] Settlement discussions can immediately reveal differences within the class in terms of substantive interests, risk aversion, hesitancy concerning issues of privacy, etc. It has long been recognized that divergence of interest among the class members can complicate or frustrate resolution of the dispute by trial, verdict, and judgment.[15] Class counsel unavoidably confronts potential divergence in the interests of class members concerning settlement possibilities. The Supreme Court decisions hold that divergence of interest among the class can take a case out of Rule 23 and, at some point, become violative of due process.[16]

The number, range, and importance of these differences suggest that defining the role of class counsel is not well begun from the "ordinary" client-lawyer relationship.

V. THE PRIVATE ATTORNEY GENERAL ANALOGY

Some courts and some analysts have analogized class counsel to an attorney general ("AG"), describing counsel as a "private attorney general."[17] This has been an interesting idea and makes sense as a negative proposition, i.e., that class counsel's roles are *not* like that of ordinary counsel. However, as an affirmative proposition, the concept of private attorney general is not only unhelpful, it is also misleading.

In the first place, there is no general proposition, standard, or uniform concept of a *public* attorney general. As far as I have been able to determine, every state in this country has an attorney general and there is also of course the Attorney General of the United States. But this nominal uniformity obscures very great differences in the office and role of attorney general. In most states the office is elective, giving the AG an independent basis of legal authority and political power—that is, authority that in other relationships normally reposes in a client. In some states, and in the federal system, the office of attorney general is appointive and hence, at least theoretically, subservient to the appointive authority.

14. The analysis by Judge Friendly in *Saylor v. Lindsley*, 456 F.2d 896 (2d Cir. 1972), remains as cogent as any since.

15. *See* Hansberry v. Lee, 311 U.S. 32 (1940); *see also* Geoffrey C. Hazard, Jr., et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV 1849 (1998).

16. *See* Ortiz v. Fibreboard Corp. 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

17. *See supra* text accompanying note 4.

In some states, the attorney general is formally responsible for all legal representation provided to the state and its agencies. That rule of organization goes back to the days when states had few legal problems and few lawyers. Today, most states and the federal system have hundreds of lawyers deployed in a dozen or more agencies. Some agencies have their "own" counsel, while in others the legal staff reports to the AG. But a multiplicity of agencies nevertheless must look to the AG as their sole source of legal representation. The exclusivity of the AG's role is often greater in litigation matters involving state agencies, as distinct from transaction matters and non-litigation legal counseling.

The relationships among different agencies that are clients of the AG can be contentious and sometimes adversarial. There are interesting conundrums for state appellate courts concerning conflicts of interest when one unit of an AG's office is litigating against another unit.[18] These conflicts are compounded when the AG has the exclusive authority to represent state agencies.

These manifold variations are recognized in the *Model Rules*, note on Scope, as follows:

> [T]he responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment .... [They] may be authorized to represent [different] government agencies in intragovernmental legal circumstances where a private lawyer could not .... They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.[19]

Wisely, the *Model Rules* did not attempt to resolve or further analyze these complexities. That modesty of address recognizes the basic point, that there simply is no uniform affirmative conception of the role of attorney general. The term therefore provides very little guidance in analogizing the role of class counsel.

More fundamental is the fact that the role of the attorney general is "public," and is legally defined in every state, even if variously defined. As a public official, whether elected or appointed, the AG is subject to political constraints, ultimately constitutional restraints, that are absent in relationships between lawyers and private clients. As stated in a casebook note: "[T]he government lawyer is not free to make choices for the client because political [and constitutional] con-

18. *See* Matter of Johnston, 663 P.2d 457 (Wash. 1985).

19. MODEL RULES OF PROF'L CONDUCT, Scope cmt. 16 (2001) (amended 2002). The same text appears in comment 18 to the Scope section of the 2002 ABA revision, except that the last sentence, concerning representation in "public interest" matters, is omitted.

straints mean that . . . the objectives of the representation . . . are never matters solely for the lawyer."[20]

It is well to recall what these constraints are. They include electoral vulnerability in continuing in office; public criticism, particularly by the media; needs for campaign funding; restriction of budgetary allocations by the executive and legislative branches; restriction and abolition of authority; reallocation of authority to other offices; and legislative investigation and denunciation. In every state there is a more or less developed unique jurisprudence about the office.

The office of attorney general in some states is so hedged with restrictions that incumbents of the office are often described as "tame." That is quite the opposite orientation of a proper class counsel.

The analogy that is drawn between class counsel and the office of attorney general evidently contemplates the historic role of the attorney general to supervise charitable trusts. This analogy is useful to the extent it recognizes that class counsel lacks the connections to the client that are involved in the ordinary client-lawyer relationship. But it is well to recall the concepts underlying the role of the public attorney general with regard to charitable trusts. A charitable trust is in some sense a public trust, in this respect therefore being a part of the "public domain." In contrast, a typical class suit concerns a private grievance, one different from an ordinary tort or contract claim only in having many alleged victims. By the same token, the defendants in a suit concerning a charitable trust are the trustees (perhaps also the officers), and therefore people who have assumed a quasi-public responsibility. The obligations of typical defendants in some class suits are of this character (for example, a class suit against a city council), but the characteristic is not generic to the class proceeding.

More fundamentally, there is little authority or professional lore on the responsibilities of a public attorney general with regard to charitable trusts. In most states, the responsibility appears to have been virtually dormant.[21] Even in states where there is some track record, the attorney general is not proactive, but typically acts only in response to some kind of grievance. Apparently, the typical remedy is an injunction against future misbehavior by the trustees, not monetary liability for past abuse. That kind of procedure provides little guidance for regulating class suits seeking damages.

Finally, the public attorney general usually does not work on a contingent fee basis, but instead proceeds through staff counsel or by retaining an outside law firm on an hourly rate or other noncontingent basis. The relationship between counsel and cause in those situations

20. GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 814 (3d ed. 1999).

21. *See* A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.02 (1994).

closely resembles the one between a social action group (such as the American Civil Liberties Union) and counsel that such an organization might employ or retain. Many, though not all, problems of class counsel derive, at least indirectly, from the contingent basis of the typical class counsel fee. The engagements of counsel on contingent fee in the state tobacco litigation have raised such questions.[22]

In summary, analogizing class counsel to a private attorney general is illuminating only to the extent that definition is supplied for the role of a public attorney general. But, as indicated above, there is no general definition of that role. As such, the analogy is question-begging.

VI. THE CORPORATE COUNSEL ANALOGY

Another basis of comparison for the role of class counsel could be that of counsel for a corporation or other organization. However, as far as I am aware, that approach yields no better insights concerning the proper role of class counsel. A few observations should suffice to explain why.

The role of corporate counsel is governed by Rule 1.13 of the *Model Rules*. In the representation of a corporation, the essential problem is that the client is a legal idea, not a person, although it "speaks" through individuals who are not clients. Accordingly, the lawyer must interact with agents for the client who do not have unqualified authority to act for the client. For example, a corporate officer cannot give the lawyer a valid order to cheat the client. Further difficulties arise where, as is often the case, the corporation has more than one agent who can speak for it. In that case, what voice should the lawyer heed?

Rule 1.13 of the *Model Rules* has the problems of corporate counsel well identified and pretty well worked out. The client is the corporation.[23] The lawyer for the corporation should act in the best interests of the corporation.[24] When acting in the corporation's best interest so requires, the lawyer should go "up the ladder" of corporate authority, ultimately to the board of directors.[25] Rule 1.13 does not clearly indicate what a lawyer should do if the board is obtuse or malfeasant. Rule 1.13(c) states that the lawyer "may" resign, but leaves it at that.

However, according to experience, it will be rare that all board members will be willing to ignore insistent legal advice to the effect that corporate officers, including the CEO, are acting adversely to the corporation's legal interests. The difficult ethical question for corpo-

22. *See generally* Symposium: *The Changing Landscape of the Practice, Financing and Ethics of Civil Litigation in the Wake of the Tobacco Wars*, 51 DEPAUL L. REV. 179 (2001).

23. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2002).

24. *Id.* R. 1.13(b).

25. *Id.* R. 1.13(c).

rate counsel typically is not whether a board will react properly to counsel's appeal over the head of management; it is whether and how to make such an appeal.

The situations of counsel for a corporation and counsel for a class are the opposite of each other, so far as dealing with the client is concerned. Counsel for a corporation may confront an unreliable or faithless corporate agent. Counsel may also confront conflicting directions from multiple corporate agents. But there is someone in authority for counsel to report to—the board, at least until the board members also prove themselves unreliable. In contrast, class counsel in an entrepreneurial class suit ordinarily either has no one to talk to or someone (the designated class representative) who has achieved status as a client by the lawyer's own act. A class suit organized by the lawyer has no structure, no spokespersons, and no authority except such as may be conferred by a court at the lawyer's initiative.

However, Rule 1.13 has something to contribute to the analysis of class counsel's role. This is the protocol or pathway of analysis for the lawyer that is set forth in Rule 1.13(b). Rule 1.13(b) postulates that the lawyer "shall proceed as is reasonably necessary in the best interest of the organization." The rule then describes how the lawyer should go about doing that: "In determining how to proceed, the lawyer shall . . . give due consideration to . . . consequences, the scope and nature of the lawyer's representation . . . and any other relevant considerations."

Rule 1.13(b) then identifies various measures the lawyer might take.[26] The relevance of Rule 1.13(b) is not what specific conduct it requires of the lawyer (which the Rule leaves open). Rather, it is the requirements that the lawyer take action when interests of the client are in jeopardy, that the action be calculated to further the client's best interests, and that the lawyer seek out available resources that could help achieve that objective. The resources that might be available in a class setting are obviously different from those available in a corporate setting. But class counsel, like corporate counsel, still could be expected to be proactive, to use some imagination, and to exercise sensible professional judgment.

26. These measures are appropriate in the corporate context but would usually be inappropriate in a class suit context. They include "asking for reconsideration," "advising that a separate legal opinion . . . be sought," and "referring the matter to higher authority in the organization." MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2002).

VII. THE CLIENT WITH DIMINISHED CAPACITY ANALOGY

Rule 1.14 of the *Model Rules* is entitled "A Client with Diminished Capacity." As revised by the ABA in 2002, the relevant provisions of this Rule are as follows:

> (a). When a client's capacity to make adequately considered decisions . . . is diminished, . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of . . . financial . . . harm . . . , the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Rule 1.14 has had little application or interpretation in reported judicial decisions. The dearth of interpretive decisions cannot be because situations of clients with diminished capacity are infrequent. For example, there is a large and growing number of senior citizen clients.[27] Instead, the more plausible inference is that lawyers generally have succeeded in quietly working through the special problems of dealing with clients who may be unable to participate in the normal client-lawyer relationship.

Rule 1.14 has generally had bad press in the legal academic community. The criticisms are that the rule is vague; that it invites "paternalism," i.e., inappropriately protective intervention by the lawyer; and that it countenances undue passivity by the lawyer, including failure to seek a guardian where necessary or routinely seeking a guardian where unnecessary.[28] In short, the objection is that the rule provides little guidance for the lawyer and minimal protection for the client.

These criticisms are in one sense well founded: Rule 1.14 does not provide much guidance beyond the injunction to act in the best interest of the client and to treat the client, so far as possible, with the same attention, consideration, and protectiveness as other clients. But none of the critics, so far as I have observed, have provided formulations that are more specific. The difficulties in devising greater specificity are suggested below.

During the deliberation by the ABA Ethics 2000 Commission, the Los Angeles Bar did make such a suggestion. That group recommended that the lawyer should always seek appointment of a guardian whenever in doubt (presumably reasonably grounded doubt) about

27. Senior citizens of course are not the only class of clients addressed by Rule 1.14, minors and mentally deficient or deranged people are also implicated by the rule. But the elderly are distinctive in being numerous and, on the average, relatively wealthy. "Elder care" has become, in law as well as in health care, a special field.

28. *See, e.g.*, A.B.A., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 209 (3d. ed. 1999) (listing articles).

the client's ability to participate intelligently in the client-lawyer relationship. The supporting argument for this proposal was that a lawyer would have a disabling conflict of interest in trying to provide proper legal assistance while also making decisions normally made by the client. This suggestion was not adopted, however, and in my opinion for good reason.

There are situations where appointment of a guardian is advisable, sometimes imperative. But there are others where it would be officious or burdensome. Appointment of a guardian is expensive, requires procedural formalities that may be offensive to the client, and sometimes may result in appointment of an inappropriate person—a near but grasping relative, for example, or a distant stranger. Further reflection, moreover, suggests that the pathway to guardianship simply relocates the complexities and uncertainties from the lawyer's office into the forum of the probate court. That venue protects the lawyer, to be sure, but it does not necessarily protect the client.

Yet, it seems to me that Rule 1.14 indeed has content, that it goes about as far as coherently possible, and that its provisions are suggestive in the task of establishing an ethical model for class counsel. First, a client with "limited capacity" accurately describes the typical situation of a class suit client, particularly where the group constituting the class does not have a preexisting organization. Indeed, in a realistic sense, the class has no existence independent of the lawyer's initiative to create it. Sometimes, of course, instead of the lawyer coming to the client, an injured potential claimant will come to a lawyer with a claim that has class suit potential. But even then, a legal transformation is involved between a victim's complaint and the framing of a plausible class action.

In this connection, the Private Securities Litigation Reform Act has a suggestive provision. This is the requirement that effort be made to involve holders of major ownership in the management of securities litigation. This provision focuses on the problem of client identity and requires initiatives by counsel and court to try to constitute a class client as near as might reasonably be to a normal client. That approach could be generalized to all class suits. One way of doing so is appointment of a guardian for the class, quite as appointment of a guardian is one possibility under Rule 1.14. There have been class suits in which that very measure has been employed.

It seems to me that the law and the courts would better address the role of class counsel by assuming that the class client prima facie has no legal capacity. Strictly speaking, that is the legal situation prior to certification. On that basis, Rule 1.14 is a useful guide.

Rule 1.14's first significant provision is the direction that the lawyer "as far as reasonably possible, maintain a normal client-lawyer relationship." The elements of a normal client-lawyer relationship

have already been postulated: competence (Rule 1.1), deference concerning objectives (Rule 1.2), diligence (Rule 1.3), communication (Rule 1.4), etc. A Rule 1.14 direction to class counsel would require counsel to think through each of those elements, not simply as required or implied by Federal Rule 23 (or a state class action counterpart) but as an independent and concurrent ethical obligation.

That analysis could begin with reflection on the competence of class counsel, in accordance with the mandate in Rule 1.1 that a lawyer refrain from taking on matters beyond his competence. It is becoming established practice that counsel presenting themselves on behalf of a proposed class describe their experience in complex litigation in general, and class litigation in particular. The court has a corresponding responsibility to compare those qualifications with other counsel. A next step often employed is a competitive "beauty contest," sometimes through an auction. It can be brought to mind that, in situations addressed in Rule 1.14, it is commonly required that there be notice and a hearing for appointment of a guardian, and also a hearing concerning appointment of counsel. Similar procedures are also employed in bankruptcy.

The matter of settlement, addressed in Rule 1.2(a), is already governed by special procedural rules in class suits, such as those requiring notice, opportunity for objection, and a hearing before and approval by the court. However, as has been widely recognized, these procedures can be reduced to formalities by pre-suit bargaining between prospective class counsel and the defendant. That dilution of the effects of formal procedures could be inhibited by requiring disclosure of pre-suit negotiation. Perhaps there should be a prohibition of "settlement upon filing." Again, there is useful experience in bankruptcy.

The duty of diligence, prescribed in Rule 1.3, could take a more elaborate form in class suits. For example, it could be required that the duty be fulfilled not only by performance, but also by demonstration, as through newsletters or regular progress reports describing where things stand. Similarly, the duty to communicate would not be fulfilled merely by compliance with the notice requirements in Rule 23(b) and (c), but by employing other means, perhaps less formal but more effective, such as simple advertisements in the media, not the legal tombstone variety; discussions with panels of members and surrogates for members; telephone or video conferencing; etc. It is noteworthy that poor communication with the client is a common grievance in normal client-lawyer relationships.

The matter of the lawyer's fee could be approached quite as it would in dealing with a legally incompetent client. That is, a fee agreement would be regarded as superfluous and a legal nullity, perhaps officious. Instead, the lawyer in a formal filing would describe

the work contemplated, state the basis on which the fee would be sought, particularly the percentage for a contingent fee, and submit the issue for de novo consideration by the court.

There is the matter of the expense of these procedures. That is indeed an objection, but one of perhaps not much force in the light of evolved contingent fee practice in this country. In contingent fee representation, counsel for the claimant ordinarily "fronts" the litigation expenses—discovery, experts, etc. Covering the cost of a suitable surrogate for the client can be considered simply another one of those expenses.

VIII. CONCLUSION

In more general terms, the point is that lawyers who would be counsel for a class, particularly a class proposed by the lawyer, should be expected, like counsel for a person lacking legal capacity, to be protective, proactive and imaginative, and to use professional judgment. Specific aspects of such a role have been indicated above. Such a standard of satisfactory performance is no less definite than that governing the lawyer's basic responsibility in any representation: To exercise sound professional judgment in the interest of the client as the client would reasonably define that interest.[29]

29. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: § 24 (2000) (A Client with Diminished Capacity).